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COMMENT

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REDEFINING REASONABLENESS: SUPERVISORY  
HARASSMENT CLAIMS IN  
THE ERA OF #METOO

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#### INTRODUCTION

In 2010, Robyn McEuen began working for a branch of AutoZone in Cordova, Tennessee.<sup>1</sup> She excelled in her position and was promoted to the position of commercial specialist the following year.<sup>2</sup> In 2012, McEuen was required to report to a new store manager, Gustavus Townsel, who was transferred to McEuen’s store from a different branch.<sup>3</sup> Immediately thereafter, McEuen became the subject of disparaging, predatory, and inappropriate remarks and actions made by Townsel—Townsel would grab McEuen from behind, touch her genital region, and repeatedly proposition McEuen despite her continual efforts to rebuff his advances.<sup>4</sup> Townsel subjected McEuen to this harassment for months while her co-workers turned a blind eye to the conduct, reasoning that she must not have been that upset because she would have reported it if she were.<sup>5</sup>

Robyn McEuen’s story is one of thousands of women who experience sexual harassment in the workplace each year in the United States. In 2019, there were 7,514 allegations of sexual harassment filed with the Equal Employment Opportunity Commission (EEOC).<sup>6</sup> This number does not

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<sup>1</sup> Equal Emp’t Opportunity Comm’n v. Autozone, Inc., 692 F. App’x 280, 281 (6th Cir. 2017).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 281-82.

<sup>5</sup> *Id.* at 282.

<sup>6</sup> *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010-FY 2018*, EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) [<https://perma.cc/8LW5-3CUX>].

nearly represent the extent of the issue, as many instances of workplace harassment go unreported. Studies have found that approximately less than thirteen percent of victims of harassment file a formal complaint—a statistic which may even be inflated.<sup>7</sup>

Since 2017, the rise of the #MeToo movement has brought greater attention to issues of sexual harassment in the workplace.<sup>8</sup> This movement was founded by civil rights activist Tarana Burke, who created a nonprofit to raise awareness and provide resources for women who have been victims of sexual harassment and violence.<sup>9</sup> The movement became a phenomenon through social media in late 2017 after Alyssa Milano, a Hollywood actress, posted on Twitter asking those who had “been sexually harassed or assaulted [to] write ‘me too’” in response to her tweet.<sup>10</sup> Hundreds of thousands posted on the social media platform in response using the “MeToo” phrasing, sparking a significant social movement.<sup>11</sup> This has brought great attention to issues related to workplace harassment, resulting in walkouts,<sup>12</sup> strikes,<sup>13</sup> and

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<sup>7</sup> CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL EMP’T OPPORTUNITY COMM’N, *Selective Task Force on the Study of Harassment in the Workplace* 16 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_ftnref63](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref63) [<https://perma.cc/XC9V-28NX>]. As many women may never disclose that they are victims of workplace harassment, this statistic is likely lower in actuality.

<sup>8</sup> The #MeToo movement is not limited to giving a voice to those who have experienced harassment in the workplace, but victims of harassment generally. *See, e.g.*, ME TOO, <https://metoomvmt.org/about/> (last visited Nov. 24, 2019) [<https://perma.cc/KT6A-2NU5>] (providing general information about the “me too” movement).

<sup>9</sup> Sandra E. Garcia, *The Woman Who Created #MeToo Long Before the Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/6XQ8-PJXE>]. In creating her nonprofit, Just Be Inc., Burke “sought out the resources that she had not found readily available . . . and committed herself to being there for people who had been abused.” *Id.*

<sup>10</sup> Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/MN93-YCBY>]. Milano’s tweet was prompted in the wake of allegations of sexual assault and harassment against Harvey Weinstein, a Hollywood producer. Garcia, *supra* note 9.

<sup>11</sup> Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014, 1014 (2018), <https://law.emory.edu/elj/elj-online/volume-68/essays/title-vii-me-too-movement.html> [<https://perma.cc/G6NK-HC5R>].

<sup>12</sup> *See, e.g.*, Jane Lanhee Lee & Paresh Dave, *Google’s ‘#Metoo’ Moment: Workers Walk Out Over Women’s Rights*, REUTERS (Nov. 1, 2018), <https://www.reuters.com/article/us-alphabet-google-harassment/google-workers-walk-out-to-protest-office-harassment-inequality-idUSKCN1N644R> [<https://perma.cc/CH27-JEYQ>] (explaining how Google employees around the world walked out to protest workplace harassment). Though the #MeToo movement is not limited to addressing issues of harassment in the workplace, this Comment will focus on the movement as related to workplace harassment and the changes that should follow.

<sup>13</sup> *See, e.g.*, Sarah Whitten, *McDonald’s Employees Stage First #MeToo Strike*, CNBC (Sept. 18, 2018), <https://www.cnn.com/2018/09/18/mcdonalds-employees-to-stage-first-metoo-strike.html> [<https://perma.cc/4J25-X4Q7>] (detailing how McDonald’s workers staged the “first multistate walkout protesting sexual harassment” and carried signs that read “#MeToo McDonald’s”).

attempts to influence state and congressional legislation.<sup>14</sup> The support of this movement may explain an increase in workplace harassment charges filed with the EEOC between 2017 and 2018.<sup>15</sup> However, social movements can only go so far to rectify the situation if the law surrounding the issue does not afford victims a remedy, or if the law prevents them from obtaining one.

The current state of the law does not favor victims of supervisory harassment who bring workplace harassment claims against their employers. If a plaintiff-employee brings such a claim, the plaintiff's employer can raise a defense known as the *Faragher-Ellerth* defense. When applying the defense, the court examines whether the employer was reasonable in seeking to prevent and correct any instances of harassment, and whether the employee was reasonable in taking advantage of the preventative or corrective measures offered.<sup>16</sup> Problematically, federal courts have inconsistently applied both elements of the defense, which has raised serious impediments to plaintiffs' workplace harassment claims. With respect to the first element of the defense, the Fourth Circuit, for example, has placed the burden on the plaintiff to rebut evidence that the defendant-employer was successful in preventing the harassment, and other jurisdictions have disregarded the necessity to find the defendant-employer acted to provide corrective measures to instances of harassment.<sup>17</sup> The inconsistent applications of the defense is a significant impediment to plaintiffs because they infringe upon both the predictability of their claims and the goal of deterring workplace harassment.

With regard to the second element of the defense, some circuit courts have held that there is no need to consider this element in cases where an employee reports a single, severe instance of harassment, which further

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<sup>14</sup> See, e.g., Cara Kelly & Aaron Hegarty, *#MeToo Was a Culture Shock. But Changing Laws Will Take More Than a Year*, USA TODAY (October 4, 2018), <https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/> [<https://perma.cc/QV3A-9BN9>]. A study conducted by USA Today found "since #MeToo began, elected officials passed 261 [state] laws that directly addressed topics championed by the movement, just a slight uptick from the 238 in the year prior." *Id.* However, few of those laws "substantially remove the barriers for victims to report and seek justice," and no new congressional laws have passed. *Id.* Congress is currently considering the EMPOWER Act, which was introduced during the 2018 Congressional session. *Id.* The Act will seek to restrict non-disclosure agreements related to sexual harassment in the workplace and create a "tip line" run by the Equal Opportunity Employment Commission. *Id.* Currently, the bill has been referred to the Subcommittee on the Constitutional, Civil Rights, and Civil Liberties. *H.R. 1521-EMPOWER Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1521/all-actions?r=97&overview=closed#tabs> [<https://perma.cc/R7FA-JM9L>].

<sup>15</sup> In 2017, 6,697 charges were filed with the EEOC, while in 2018, 7,609 were filed. *Charges Alleging Sex-Based Harassment*, *supra* note 6.

<sup>16</sup> See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (defining the two necessary elements of an affirmative defense an employer can raise when "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor").

<sup>17</sup> See *infra* Section II.A.

contributes to the inconsistency in which it has applied.<sup>18</sup> Additionally, courts will frequently find that it is unreasonable as a matter of law if a woman waits or fails to report allegations of supervisory harassment to her employer and will grant summary judgment in favor of the defendant-employer.<sup>19</sup> Courts will find plaintiffs' delays in reporting to be unreasonable even if the plaintiff appears to have a justifiable reason for delaying to report her allegations of harassment.<sup>20</sup> This is problematic as courts fail to consider the psychological impact harassment can have on a woman. Studies have reported on the psychological trauma and physical manifestations of this trauma victims of harassment may suffer, which can influence a woman's choice to delay or refrain from reporting.<sup>21</sup> In the case of Robyn McEuen, because McEuen's claims went unreported for approximately two and a half months, a case brought by the Equal Employment Opportunity Commission against McEuen's employer failed.<sup>22</sup>

Federal courts' application of this defense impedes victims from vindicating their rights and fails to give credence to their claims. For these reasons, courts should adopt a modified approach that allows for both a more consistent application of the *Faragher-Ellerth* defense and permits courts to consider victims' responses to instances of harassment. With respect to the first element of the defense, this approach should encourage consideration of whether the defendant-employer implemented an equitable anti-harassment policy and whether the employer responded reasonably in providing corrective measures for alleged instances of harassment. With respect to the second element of the defense, this approach should encourage consideration of the employee's rationale for waiting to report an instance of harassment. Courts should refrain from determining the reasonableness of both elements of the defense as a matter of law, as material facts often exist with respect to each element.

One such approach has been adopted by the Third Circuit in a decision published in July of 2018, *Minarsky v. Susquehanna County*.<sup>23</sup> This decision held that reasonableness is "the cornerstone of this analysis" and that it is best left for the jury to decide.<sup>24</sup> This decision has recently received some attention, with scholarship noting that *Minarsky* "is more consistent with the language of *Faragher* and *Ellerth* opinions, as well as the policy underlying

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<sup>18</sup> See *infra* Section II.B.

<sup>19</sup> See *infra* subsection II.C.1.

<sup>20</sup> See *infra* subsection II.C.2-3.

<sup>21</sup> See *infra* subsection II.C.4.

<sup>22</sup> Equal Emp't Opportunity Comm'n v. AutoZone Inc., 692 F. App'x 280, 286 (6th Cir. 2017).

<sup>23</sup> 895 F.3d 303, 314 (3d Cir. 2018).

<sup>24</sup> *Id.* at 311.

Title VII.”<sup>25</sup> Significantly, no other federal circuit court has adopted a similar standard of reasonableness to apply to this defense.

This Comment will focus on why a new approach is needed to the *Faragher-Ellerth* defense. I will detail how federal courts have applied incongruous and disjointed reasoning when addressing hostile work environment claims with respect to both elements of the defense, and how courts have failed to consider the psychological impact that instances of harassment can have on victims that may contribute to their reluctance or failure to report claims of harassment to their employer. I will argue that in light of the #MeToo movement, this problematic application poses a serious impediment to plaintiff-employees seeking to vindicate their rights in bringing these claims. Overall, I will contend that it is necessary for courts to reconsider this standard and apply an approach, like the approach articulated by the Third Circuit, that emphasizes the reasonableness of both parties.

## I. AN OVERVIEW OF TITLE VII AND SUPERVISORY HARASSMENT CLAIMS

Workplace harassment claims were not always actionable. Section 703 of Title VII of the Civil Rights Act of 1964 made it an “unlawful employment practice” for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” or to “tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” on the basis of sex.<sup>26</sup> However, it was not until 1986 that the Supreme Court affirmatively acknowledged that a cause of action existed to redress instances of harassment an employee experienced in the workplace as a result of their supervisor’s conduct.<sup>27</sup> In *Meritor Savings Bank v. Vinson*, the Supreme Court held that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”<sup>28</sup> This groundbreaking

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<sup>25</sup> Matthew D. Venuti, *Modernizing the Workplace: The Third Circuit Puts the Faragher-Ellerth Affirmative Defense in Context*, 64 VILL. L. REV. 535, 538 (2019).

<sup>26</sup> 42 U.S.C. § 2000e-2(a)(1)–(2) (2018). It is also unlawful for an employer to take such actions against an employee on the basis of the employee’s race, color, religion or national origin. *Id.*

<sup>27</sup> A claim of hostile work environment by an employee’s co-worker is held to a different standard: “[I]f the harassing employee is a co-worker, a negligence standard applies. To satisfy that standard, the complainant must show that the employer knew or should have known of the offensive conduct but failed to take appropriate corrective action.” *Vance v. Ball St. Univ.*, 570 U.S. 421, 453–54 (2013). This Comment addresses claims of harassment against an employee’s supervisor only.

<sup>28</sup> 477 U.S. 57, 66 (1986). In this case, Mechelle Vinson brought an action against her former employer, Meritor Savings Bank, and her supervisor, Sidney Taylor, alleging that during her four years working at the bank, she was subjected to sexual harassment by Taylor. *Id.* at 59–60. Vinson alleged that after she was trained as a teller at the bank in 1974, Taylor invited her to dinner and “suggested that they go to a motel to have sexual relations.” *Id.* at 60. Vinson alleged she feared

case marked the first time that the Supreme Court explicitly acknowledged that victims of harassment in the workplace can have a remedy in court.<sup>29</sup>

The Court held that hostile work environment claims can arise in the presence of a tangible employment action,<sup>30</sup> which includes decisions that “[a]ffect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>31</sup> However, a hostile work environment claim can also be actionable in the absence of a tangible employment action.<sup>32</sup> Further, the Court in *Meritor* explained that for such a claim to be actionable, it must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>33</sup> Later, the Court in *Harris v. Forklift* held that “severe or pervasive” is held to both a subjective and objective standard—conduct must have “create[d] an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive” and the victim must have subjectively perceived the environment to be abusive as well.<sup>34</sup>

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losing her job and thus agreed to Taylor’s request. *Id.* Vinson alleged that Taylor subsequently repeatedly demanded that Vinson perform sexual acts on him and that out of fear, Vinson agreed. *Id.* Vinson alleged that Taylor touched her inappropriately, exposed himself to her, followed her into the restroom, and that Taylor raped her several times. *Id.* The case went to trial, and Vinson testified that due to her fear of Taylor “she never reported his harassment to any of his supervisors and never attempted to use the bank’s complaint procedure.” *Id.* at 61. The district court held that Vinson was not the victim of sexual harassment during the course of her employment, reasoning that any sexual relationship between Vinson and her supervisor was voluntary because it was unrelated to her employment or advancement; thus, there was no quid pro quo. *Id.* The District of Columbia Court of Appeals reversed and held that “a violation of Title VII may be predicated on . . . harassment that . . . creates a hostile or offensive working environment.” *Id.* at 62. The Supreme Court affirmed this interpretation of Title VII and held that “[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” *Id.* at 68. The Court held that harassment may be predicated on either “harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment.” *Id.* at 62. Harassment that involves conditioning employment benefits or favors is known as quid pro quo and entails “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” *Id.* at 65 (citing 29 C.F.R. § 1604.11(a) (1985)). The focus of this Comment will be on claims of hostile work environment that do not affect economic benefits, or non-quid pro quo claims.

<sup>29</sup> See Robert R. Graham, *Two Wrongs Do Not Make a Right: The Need to Revisit the Ellerth/Faragher Affirmative Defense*, 30 NOTRE DAME J.L. ETHICS & PUB. POL’Y 423, 426 (2016) (citing *Meritor* as the first specific recognition of two kinds of actionable harassment claims: quid pro quo and hostile environment).

<sup>30</sup> *Meritor*, 477 U.S. at 67.

<sup>31</sup> *Vance*, 570 U.S. at 431 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

<sup>32</sup> *Ellerth*, 524 U.S. at 765.

<sup>33</sup> *Meritor*, 477 U.S. at 67 (internal quotation marks and citation omitted).

<sup>34</sup> 510 U.S. 17, 21 (1993). The Court explained that the “severe or pervasive” standard “takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.” *Id.* These effects do not have to be tangible in

In *Meritor*, the Court did not explicitly hold that an employer can be vicariously liable for the harassing conduct of a supervisor that gives rise to a claim of hostile work environment and declined to opine on “a definitive rule on employer liability” regarding the standard of vicarious liability in that context.<sup>35</sup> However, in 1998, the Supreme Court did hold that an employer can be vicariously liable for the actions of a supervisor who has subjected an employee to harassing conduct that is severe or pervasive.<sup>36</sup> The Court sought to square this imposition of vicarious liability by preventing an employer from becoming “‘automatically’ liable for harassment by a supervisor who creates the requisite degree of discrimination.”<sup>37</sup> In differentiating a claim of supervisory harassment from the standard surrounding traditional agency liability, the Court held that “[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.”<sup>38</sup> The Supreme Court in 2013 clarified the definition of supervisor by holding that a supervisor is one who can “cause ‘direct economic harm’ by taking a tangible employment action” against an employee.<sup>39</sup> Thus, the defense can only be applied in hostile work environment claims where the allegation is that a supervisor *did not* take a tangible action against the plaintiff-employee.

This affirmative defense requires that a defendant-employer prove two elements by a preponderance of the evidence; the first requires “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and the second requires “that the plaintiff

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nature; the Court noted that “the very fact that discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.” *Id.* at 22. The Court made clear that a “discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers” and that “no single factor is required” in determining whether an environment is sufficiently severe or pervasive. *Id.* at 22-23.

<sup>35</sup> *Meritor*, 477 U.S. at 72.

<sup>36</sup> *Ellerth*, 524 U.S. at 765.

<sup>37</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 (1998). The Court has also noted that although employers can be held vicariously liable for intentional torts that their employees commit within the scope of their employment, “[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment.” *Ellerth*, 524 U.S. at 757.

<sup>38</sup> *Faragher*, 524 U.S. at 807. The exact language detailing the elements needed to establish a hostile work environment claim against one’s supervisor varies slightly between circuit courts. Generally, to meet a prima facie case, an employee must show that he or she suffered discrimination because her or she is a member of a protected class, that it was severe or pervasive, and that respondeat superior liability exists. *See, e.g., Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013).

<sup>39</sup> *Vance v. Ball St. Univ.*, 570 U.S. 421, 440 (2013); *see also Pa. State Police v. Suders*, 542 U.S. 129, 134 (2004) (clarifying that if an employee is constructively discharged, in that the employee feels forced to resign due to an abusive working environment, this does not count as a tangible employment action and the defense can be applied).

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>40</sup> If a plaintiff alleges that a supervisor committed harassment in the absence of a tangible employment action, the employer must demonstrate both of these elements to assert the affirmative defense.<sup>41</sup> This has come to be known as the *Faragher-Ellerth* affirmative defense after the name of two Supreme Court decisions released on the same day in 1998, *Burlington Industries v. Ellerth*<sup>42</sup> and *Faragher v. City of Boca Raton*.<sup>43</sup>

This defense has frequently been raised,<sup>44</sup> as it allows courts to grant summary judgment in favor of the defendant-employer when both prongs are met. The defense sought to achieve the goals of avoiding harm and encouraging victims of harassment to come forward and report their allegations of harassment.<sup>45</sup> In practice, however, federal courts’ interpretation and application of the defense has become an unjustified hurdle for plaintiffs and, in many instances, both elements of the defense are easily met even in circumstances of egregious harassment.<sup>46</sup> If the *Faragher-Ellerth* defense had been applied to the facts of *Meritor*, it is unlikely that a lower court would have found that the defendant-employer was liable and would have granted summary judgment in favor of the defendant because the plaintiff never reported the harassment to her employer.<sup>47</sup> Since the establishment of the defense, federal courts have been otherwise unsympathetic to plaintiffs, many of whom suffer in silence. Such treatment by federal courts is intolerable and a new approach to the defense must be recognized.

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<sup>40</sup> *Ellerth*, 524 U.S. at 765.

<sup>41</sup> *Id.*

<sup>42</sup> 524 U.S. 742 (1998).

<sup>43</sup> 524 U.S. 775 (1998).

<sup>44</sup> A search on Westlaw reveals that in the past three years alone the defense has been cited nearly 300 times.

<sup>45</sup> *Faragher*, 524 U.S. at 806; see also L. Camille Hebert, *Why Don't Reasonable Women Complain about Sexual Harassment?*, 82 IND. L.J. 711, 715 (2007) (“The Court noted that the affirmative defense was intended to support Title VII’s ‘policies of encouraging forethought by employers and saving action by objecting employees.’” (citation omitted)).

<sup>46</sup> See, e.g., *Walton v. Johnson & Johnson Serv., Inc.*, 347 F.3d 1272, 1276-77, 1293 (11th Cir. 2003) (granting summary judgment for the defendant-employer that invoked the affirmative defense in a case in which the plaintiff’s supervisor repeatedly raped her).

<sup>47</sup> See *supra* note 28 and related explanation of factual circumstances of *Meritor*. The plaintiff did not report the years of harassment she experienced because she feared her supervisor. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 61 (1986).

## II. FARAGHER-ELLERTH IN PRACTICE: THE PROBLEMATIC APPLICATION TO SUPERVISORY HARASSMENT CLAIMS

Federal courts' application of the *Faragher-Ellerth* defense is problematic for several reasons. Primarily, federal courts have adopted inconsistent standards when applying both the first and second elements of the defense; thus, an employee-victim's case is influenced by the jurisdiction in which the case is brought.<sup>48</sup> In rendering these decisions, federal courts are quick to allow employers to escape liability at the summary judgment stage, despite the existence of questions of material facts. Through this defense, federal courts have applied the law in such cases "in ways quite hostile to the interests of women who have been sexually harassed and quite favorable to the interests of employers whose supervisory employees have been accused of sexual harassment."<sup>49</sup> They have failed to give due deference to victims' concerns and reasons for waiting to report harassment.<sup>50</sup> Such applications of this defense have resulted in serious impediments for plaintiff-employees in bringing their claims and, in the interest of justice, should be reevaluated.

### A. Inconsistent Applications of the First Prong of the Affirmative Defense

As noted, federal courts have inconsistently applied the first element of the affirmative defense to cases of supervisory harassment, which requires "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."<sup>51</sup> In both *Faragher* and *Ellerth*, the Supreme Court did not explicitly outline the approach federal courts should take in addressing this first prong, but did offer that "the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."<sup>52</sup>

Based on the Supreme Court's language, most federal courts have recognized that the first prong includes two subcomponents: the employer must take measures to both *prevent* harassment and to *correct* instances of harassment that the employer becomes aware of.<sup>53</sup> However, federal courts

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<sup>48</sup> See *infra* Sections II.A–B.

<sup>49</sup> Hebert, *supra* note 45, at 715.

<sup>50</sup> See *infra* Section II.C.

<sup>51</sup> *Ellerth*, 524 U.S. at 765.

<sup>52</sup> *Id.*; *Faragher*, 524 U.S. at 778.

<sup>53</sup> See, e.g., *Weger v. City of Ladue*, 500 F.3d 710, 719 (8th Cir. 2007) (noting that "[t]he first element of the affirmative defense imposes two requirements on employers, they must have (1) exercised reasonable care to prevent sexual harassment (the 'prevention prong') and (2) promptly corrected any sexual harassment that did occur (the 'correction prong')"); see also, *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999) ("The first prong of the *Ellerth* affirmative defense also requires [the employer-defendant] to prove that it exercised reasonable care to respond to the sexual harassment.").

have taken different approaches regarding what they view as necessary to satisfy the first prong of this element: the “prevention prong.”<sup>54</sup> With regard to this prong, most courts have provided that evidence of implementation and dissemination of an anti-harassment policy can aid defendant-employers in satisfying this component.<sup>55</sup> The Tenth Circuit has even found that evidence of implementation and dissemination of an anti-harassment policy is enough for the court to find that the employer satisfied the prevention prong as a matter of law, even if the employer “provided no [anti-]harassment training or provided training only to managers.”<sup>56</sup> This application of the prevention prong is problematic because it does not help to encourage employers to implement deterrent measures, such as training programs, that can be enforced with the goal of preventing harassment in the workplace.

Furthermore, the Fourth Circuit has applied an approach that differs from other courts’ by providing a presumption that the “dissemination of ‘an effective anti-harassment policy provides compelling proof’ that an employer has exercised reasonable care to prevent and correct sexual harassment.”<sup>57</sup> Plaintiff-employees can only rebut this presumption by providing evidence that the “employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional.”<sup>58</sup>

The Fourth Circuit is the only federal circuit that has implemented this approach that provides a presumption that the defendant-employer has satisfied the prevention prong. However, district courts in other jurisdictions have applied this logic.<sup>59</sup> This approach creates an additional hurdle for

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<sup>54</sup> Though some attention has been brought to a circuit split regarding whether the application of the second prong of the defense is necessary, *see infra* Section II.B, little attention has been brought to the different standards that federal courts have applied in evaluating the first prong of the defense.

<sup>55</sup> *See Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001) (citing *Lissau v. S. Food Servs., Inc.*, 159 F.3d 177, 182 (4th Cir. 1998)) (noting “that dissemination of ‘an effective anti-harassment policy provides compelling proof’ that an employer has exercised reasonable care to prevent and correct sexual harassment”); *see also* *Reed v. MBNA Mktg. Sys. Inc.*, 333 F.3d 27, 34 (1st Cir. 2003) (examining whether “reasonable precautions to prevent and correct promptly any sexually harassing behavior by its employees” were taken by the defendant-employer); *Macks v. Otis Elevator Co.*, 326 F.3d 116, 128 (2d Cir. 2003) (“One way for employers to demonstrate that they exercised reasonable care is to show that they had an anti-harassment policy in place.”); *Shaw*, 180 F.3d at 811 (noting that adopting and distributing a policy is sufficient).

<sup>56</sup> *Stapp v. Curry Cty. Bd. of Cty. Comm’rs*, 672 F. App’x 841, 849 (10th Cir. 2016) (citing *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 653 (10th Cir. 2013)) (internal quotation marks omitted).

<sup>57</sup> *Matvia*, 259 F.3d at 268 (4th Cir. 2016) (citing *Lissau*, 159 F.3d at 182); *see also* *McKinnish v. Brennan*, 630 F. App’x 177, 183 (4th Cir. 2015) (noting the same).

<sup>58</sup> *Walton v. N.C. Dep’t of Agr. & Consumer Servs.*, 494 F. App’x 300, 302 (4th Cir. 2012) (citing *Barret v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001)).

<sup>59</sup> *See O’Dell v. Trans World Entm’t Corp.*, 153 F. Supp. 2d 378, 388 (S.D.N.Y. 2001) (explaining that if a defendant-employer provides evidence of a harassment policy to satisfy the first element of

plaintiff-employees to overcome, as this rebuttable presumption makes it easier for defendant-employers to meet the first element of this defense. For example, in *McKinney v. G4S Government Solutions, Inc.*, the Western District of Virginia held that the plaintiff-employee “trie[d] to overcome this [burden] . . . by relying on his own testimony that there was little training on the [employer’s] policy, and no retraining, although the employees were asked to sign forms saying that they had been retrained” and that a supervisor threatened employees to not make anti-harassment complaints.<sup>60</sup> However, the court still found that there was “simply insufficient evidence in the record from which a reasonable jury could find the policy was dysfunctional or adopted in bad faith.”<sup>61</sup>

With regard to the second prong of the defense’s first element, the “correction prong,” federal courts have traditionally separated the analysis of whether the employer had taken reasonable correction measures from whether the employee had reported the instances of harassment to the employer.<sup>62</sup> The Seventh Circuit has a comparatively high standard for employers to meet the correction prong, requiring that the corrective measures employers take “must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made.”<sup>63</sup>

In contrast, the Eleventh Circuit has taken a different approach with respect to the correction prong by allowing the defense to circumvent its application in certain instances. The Eleventh Circuit has provided that “once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and

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the defense, “[t]he employee may then rebut the employer’s proof by showing that the sexual harassment policy is not effective, which can be demonstrated . . . by evidence that the employer did not disseminate its policy to its employees.”); *see also* *Hunt v. Wal-Mart*, 931 F.3d 624, 630 (7th Cir. 2019) (“An employer’s adoption of an effective anti-harassment policy is an important factor in determining whether it exercised reasonable care to prevent sexual harassment.”); *Aiello v. Stamford Hosp.*, No. 09-1161, 2011 WL 3439459, at \*26 (D. Conn. Aug. 8, 2011) (finding that the defendant satisfied the first element of the defense because the defendant provided sufficient evidence that they had a harassment policy in place and the plaintiff failed to rebut this).

<sup>60</sup> 179 F. Supp. 3d 609, 623 (W.D. Va. 2016).

<sup>61</sup> *Id.*

<sup>62</sup> *See* *E.E.O.C. v. Cromer Food Servs. Inc.*, 414 F. App’x 602, 607 (4th Cir. 2011) (explicitly rejecting the approach of the Eleventh Circuit, explaining that “the Eleventh Circuit held that an employee who had not followed the anti-harassment policy had not effectively put the company on notice. This is not the approach taken by the Fourth Circuit”) (internal citation omitted).

<sup>63</sup> *Cerros v. Steel Tech., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (citing *McKenzie v. Ill. Dep’t of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996)).

grievances.”<sup>64</sup> Once the policy has been distributed, the Eleventh Circuit seemingly allows courts to jump directly to the second element of the affirmative defense that analyzes whether the employee has “tak[en] advantage of any preventive or corrective opportunities provided by the employer.”<sup>65</sup> For example, in *Scott v. Publix Supermarkets*, the plaintiff alleged that her supervisor ordered the plaintiff to give him back rubs, asked the plaintiff “what she would do if he kissed her and what she would do if he walked her to her car, pressed her against it, and kissed her” and would “call across the parking lot for her to lift up her shirt,” among other conduct.<sup>66</sup> The Southern District of Florida, relying on the Eleventh Circuit’s approach, found it unnecessary to analyze the correction prong because the plaintiff did not report the harassment to the store managers.<sup>67</sup> The court jumped to its analysis of the second element of the affirmative defense as a result.<sup>68</sup> Permitting courts to skip their analysis of the correction prong creates another safeguard for the defense that defendant-employers can use to meet the preponderance standard. This exemplifies how a plaintiff-employee may be more likely to face a grant of summary judgment if she files her claim in the Eleventh Circuit as opposed to elsewhere.

Furthermore, in considering the first element in its entirety, some courts have found that it is not necessary for both the prevention and correction methods the employer has implemented to be successful to satisfy the first element. Specifically, some courts have held that merely an attempt by the employer to address the problem is sufficient. For example, the Second Circuit has held that “[a]n employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing *and* correcting sexually harassing conduct.”<sup>69</sup> This does not serve to deter harassment or encourage employers to take firm measures to prevent harassment in the workplace but merely provides them with a safety valve to escape liability in an instance in which an employee has been the

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<sup>64</sup> *Cooper v. CLP Corp.*, 679 F. App’x 851, 855 (11th Cir. 2017) (citing *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1300 (11th Cir. 2000)); *see also* *Jones v. Allstate Ins. Co.*, 707 F. App’x 641, 649 (11th Cir. 2017) (noting the same, though briefly describing a corrective measure the defendant-employer took); *Nichols v. Volunteers of Am., N. Ala., Inc.*, No. 08-S-501, 2013 WL 1767803, at \*3 (N.D. Ala. Apr. 24, 2013) (finding that the “defendant exercised reasonable care in preventing harassment based upon the existence, content, and dissemination of its anti-harassment policy”).

<sup>65</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

<sup>66</sup> No. 07-60624, 2008 WL 2940672, at \*1-2 (S.D. Fla. July 28, 2008).

<sup>67</sup> *Id.* at \*7.

<sup>68</sup> *Id.* at \*7-8.

<sup>69</sup> *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001) (citing *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999)) (emphasis added); *see* *Steffy v. Ford Motor Co.*, No. 04-319S, 2007 WL 895506, at \*15 (W.D.N.Y. Mar. 22, 2007) (noting this and finding that existence of a policy was sufficient to satisfy the first element of the defense).

victim of appalling behavior. This is again representative of the inconsistent manner in which circuit courts have applied the first element of the defense.

B. *Inconsistent Application of the Second Element of the Affirmative Defense*

Several federal circuit courts have found it unnecessary to examine the second element of the affirmative defense in certain instances, providing further evidence of how federal courts have incongruously applied this defense. Scholarship has detailed this circuit split, noting that some “courts hold that employers must prove only the first [element] of the defense in order to prevail when there has been a single, severe incident of harassment” while others apply the whole defense in all instances.<sup>70</sup>

To contextualize this circuit split, the Fifth and Eighth Circuits have dropped the first element in cases of “rapid-onset harassment” in which there was a single, typically severe, instance of harassment, rather than a case in which there are repeated instances of harassment by a supervisor.<sup>71</sup> For example, in *Indest v. Freeman Decorating, Inc.*, the plaintiff-employee alleged that while she was attending a work convention over a four-day period, her supervisor made a series of “crude sexual comments and sexual gestures” to her, and the plaintiff reported the incidents to her manager and human resources director upon returning.<sup>72</sup> The company issued a warning to the plaintiff’s supervisor and suspended the supervisor for seven days without pay.<sup>73</sup> The plaintiff subsequently brought a hostile work environment claim against her employer, and the employer raised the affirmative *Faragher-Ellerth* defense.<sup>74</sup> The Fifth Circuit granted summary judgment finding that the defendant-employer satisfied the first element of the affirmative defense, holding that “a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which

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<sup>70</sup> Natalie S. Neals, Comment, *Flirting with the Law: An Analysis of the Ellerth/Faragher Circuit Split and a Prediction of the Seventh Circuit’s Stance*, 97 MARQ. L. REV. 167, 171 (2013); see also *id.* at 184-86; Charles W. Garrison, *Once Is Enough: The Need to Apply the Full Ellerth/Faragher Affirmative Defense in Single Incident and Incipient Hostile Work Environment Sexual Harassment Claims*, 61 CATH. U. L. REV. 1131, 1145 (2012); Graham, *supra* note 29, at 430-34; John H. Marks, *Smoke, Mirrors, and the Disappearance of Vicarious Liability: The Emergency of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1439 (2002).

<sup>71</sup> See *McCurdy v. Ark. State Police*, 375 F.3d 762, 774 (8th Cir. 2004); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 260 (5th Cir. 1999); see also Neals, *supra* note 70, at 182-83.

<sup>72</sup> *Indest*, 164 F.3d at 260.

<sup>73</sup> *Id.* at 261. After learning of Indest’s intent to file charges with the EEOC, the company issued a written statement that confirmed the actions the company took and wrote to the supervisor that “[the company is] particularly concerned that there never [was] any discriminatory action taken against Connie Indest in retaliation [for] her complaint. It is vitally important that there be no future instances of sexual harassment of our employees by you.” *Id.*

<sup>74</sup> *Id.*

a company was never called upon to react to a supervisor's protracted or extremely severe acts that created a hostile environment."<sup>75</sup>

Other courts have explicitly rejected this approach. For example, in *Harrison v. Eddy Potash, Inc.*, the Tenth Circuit held that "the reasoning of *Indest* is highly suspect and, in our view, should not be adopted" as "there is no reason to believe that the 'remarkably straightforward' framework outlined in *Faragher* and *Burlington* does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment."<sup>76</sup>

This circuit split is representative of another way in which the affirmative defense has been inconsistently applied across circuits. Circuit courts' refusal to apply the defense in instances of single cases of harassment is problematic as it allows an employer to avoid liability in a potentially egregious, albeit standalone, instance of harassment. Scholars have noted that in courts' refusal to apply the full defense, "an employer who exercises reasonable care in responding to a complaint of sexual harassment will be able to prevail on the affirmative defense and avoid liability even if the conduct was severe or pervasive."<sup>77</sup> A plaintiff's claim should not fail simply because harassment occurred during only one instance.<sup>78</sup> In standard cases of vicarious liability,

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<sup>75</sup> *Id.* at 265, 267. Similarly, in *McCurdy v. Ark. State Police*, the Eighth Circuit also declined to apply the second element of the defense cases of rapid-onset harassment. 375 F.3d 762, 772 (8th Cir. 2004). In this case, the plaintiff worked as a radio dispatcher; one evening, her supervisor came in and "cupped, touched, [and] brushed against" her left breast, and told her that if he were in charge "[her] uniform would be panties and a tank top," among other comments. *Id.* at 764. The plaintiff reported the behavior, and the plaintiff's employer conducted an investigation and terminated the supervisor's employment over two months later; however, the supervisor's employment was subsequently reinstated and he was transferred to a different unit. *Id.* at 766-67. The employer invoked the affirmative defense, and the Eighth Circuit held that because the defendant-employer promptly responded to the allegation, it would be inappropriate to follow the *Faragher-Ellerth* defense as outlined by the Supreme Court, and that the reviewing employer's response alone (the first element of the defense) was sufficient to grant summary judgment. *Id.* at 774.

<sup>76</sup> 248 F.3d 1014, 1026 (10th Cir. 2001); see also *Alade v. AWS Assistance Corp.*, 796 F. Supp. 2d 936, 946 (N.D. Ind. 2011) (also upholding both elements of the defense). The EEOC appears to support this position as well. See Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/policy/docs/harassment.html> [<https://perma.cc/MC7Q-P3C5>] (noting that "[t]he employer will be shielded from liability for harassment by a supervisor only if it proves that it exercised reasonable care in preventing and correcting the harassment and that the employee unreasonably failed to avoid all of the harm"); Neals, *supra* note 70, at 190 (explaining that the EEOC endorses application of both elements in all circumstances).

<sup>77</sup> David Sherwyn et al., *Don't Train Your Employees and Cancel Your '1-800' Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1295-96 (2001).

<sup>78</sup> As has been noted, "[i]n gradual-onset cases, a judge should rarely be able to decide, as a matter of law, that the reasonable person, given all the circumstances, necessarily would have regarded the abuse threshold as crossed with the supervisor's first antic, or the second one, or the third one, and so on." Marks, *supra* note 70, at 1449.

even if the supervisor committed an intentional tort in a single instance, the employer can be held liable.<sup>79</sup> Holding otherwise cuts against the aim to deter workplace harassment, and such an approach should not be condoned.

### C. *The Unreasonable Application of the Second Element*

Federal courts frequently hold that if a plaintiff-employee waits, or declines to, report an instance of harassment to her employer, the plaintiff is unreasonable as a matter of law under the second element of the defense. However, the affirmative defense does not provide that an employee must report an allegation of harassment within a specific timeframe, which has left plaintiffs with an unclear standard as to what amounts to an unreasonable delay in reporting. Further, courts have held that the employees are unreasonable by failing to follow the precise reporting procedures in their employee policies and have failed to consider that plaintiffs may have a justifiable reason for waiting to report. In coming to these decisions, courts do not consider the psychological trauma incidents of harassment can have on a victim which may contribute to a plaintiff's reason for delaying to report an allegation of harassment. This further represents why a new standard is needed when examining these claims.

#### 1. Courts Find That Delays in Reporting Are Unreasonable as a Matter of Law

As noted, the second element of the affirmative defense requires the court to consider how reasonable a plaintiff-employee was in taking advantage of the preventative opportunities the employer offers. Though the defense was aimed at preventing harm and deterring sexual harassment, many courts have held that employee-plaintiffs' delays in reporting instances of harassment to their employers are unreasonable as a matter of law.<sup>80</sup> Scholars have noted that “[a]s a general matter, courts have strictly enforced the victim's duty to complain.”<sup>81</sup> In many instances, federal courts have held that the plaintiff-

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<sup>79</sup> See, e.g., *Spurlock v. Townes*, 661 F. App'x 536, 540 (10th Cir. 2016) (holding that “an employer may be held liable for the intentional torts of an employee—even if the employee was acting outside the scope of his or her employment—if the employee ‘was aided in accomplishing the tort by the existence of the agency relation’”).

<sup>80</sup> See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 21 (2003) (“Cases analyzing this prong of the affirmative defense have focused on whether the victim made correct use of the grievance procedures, how long the victim waited to complain, and whether a victim who failed to complain had any justification for her silence.”).

<sup>81</sup> *Id.*; see also Venuti, *supra* note 25, at 551 (explaining that “an employer can usually establish the second prong if it can show that the employee delayed acting upon an anti-harassment policy”).

employee was unreasonable for waiting a few weeks or a few months to report an instance of harassment.<sup>82</sup>

For example, in July of 2019, the Seventh Circuit found that a plaintiff-employee was unreasonable as a matter of law for waiting for months to report an instance of harassment.<sup>83</sup> In *Hunt v. Wal-Mart Stores*, the plaintiff-employee, Tristana Hunt, alleged that her supervisor sexually harassed her on a daily basis for over five months.<sup>84</sup> Hunt's supervisor, Daniel Watson, frequently asked to see her breasts, telling "her he wanted to shower with her and feel her breasts."<sup>85</sup> After four months of experiencing frequent harassment, Hunt reported Watson's conduct to the store manager. The manager "concluded [that] Hunt's claims could not be substantiated without corroborating witnesses" and merely required Hunt's supervisor to retake an ethics course even though another employee had previously made a similar complaint against Watson.<sup>86</sup> The Seventh Circuit reasoned that "employees have a duty to utilize reporting mechanisms provided by their employer, or otherwise alert their employer of the problem," and found that because Hunt failed to take advantage of Wal-Mart's reporting systems for four months, she acted unreasonably.<sup>87</sup> Courts have frequently held that delays are unreasonable as a matter of law without considering the toll harassment can take on plaintiff-employees and giving credence to the reasons they may hesitate to report.<sup>88</sup> Further, such decisions to hold such delays unreasonable

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<sup>82</sup> A study conducted in 2001 that reviewed the first seventy-two published decisions that invoked the *Faragher-Ellerth* defense found that in a dozen of those cases "courts found plaintiffs to have acted unreasonably because they delayed reporting the harassment. In some cases, there was a delay of one year or more between the first harassing actions and the report. In other cases, however, the delay was a matter of months or even weeks." Sherwyn et al., *supra* note 77, at 1297.

<sup>83</sup> *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624, 631 (7th Cir. 2019).

<sup>84</sup> *Id.* at 627.

<sup>85</sup> *Id.* at 626.

<sup>86</sup> *Id.* at 626-27.

<sup>87</sup> *Id.* at 631. Similarly, in *Williams v. United Launch Alliance*, the plaintiff alleged that her supervisor made frequent sexual comments and facial gestures towards her; at one point, her supervisor "approached [her] from behind as she returned to her workstation . . . and informed her that he was doing a 'butt block' . . . so nobody else could see it. 286 F. Supp. 3d 1293, 1299 (N.D. Ala. 2018). At another point, he told her that employees in another department would want to see her "down on all fours," and he frequently made other similarly lewd comments. *Id.* at 1300. The court held that because the plaintiff did not strictly comply with the employer's policy that detailed employees should promptly report harassment "preferably within three business days of the conduct," and because the employee waited sixteen months since the harassment began, and four months after the employee experienced the most recent incident of harassment, the delay was unreasonable as a matter of law. *Id.* at 1309-10. Ultimately, the court granted summary judgment in favor of the defendant-employer. *Id.* at 1311.

<sup>88</sup> See, e.g., *Mackenzie v. Potter*, 219 F. App'x 500, 504-05 (7th Cir. 2007) (holding a seven month delay unreasonable as a matter of law); see also *Christian v. AHS Tulsa Reg'l Med., LLC*, 430 F. App'x 694, 700 (10th Cir. 2011) (finding that waiting until October to report incidents of harassment that occurred between January and May was unreasonable); *Pinkerton v. Colo. Dep't of*

as a matter of law have been criticized as “typically treat[ing] these purportedly unreasonable delays as something akin to contributory negligence—a complete bar to recovery.”<sup>89</sup>

However, some lower courts have found delays within similar timeframes to be reasonable. For example, in *Chin-McKenzie v. Continuum Health Partners*, the Southern District of New York declined to grant summary judgment even though the plaintiff-employee waited five months to report her allegations of harassment.<sup>90</sup> These inconsistent standards are problematic since the Supreme Court has never provided a bright-line rule as to what is considered a justifiable delay in reporting. This makes it difficult for plaintiffs to predict what courts will deem to be a reasonable response.<sup>91</sup>

Furthermore, in instances where plaintiffs report but fail to comply with the specifics of their employer’s reporting procedure, or when plaintiffs provide a justification for waiting to report, courts are still hesitant to find that this validates plaintiffs’ claims. As will be explained, in these instances, courts may still grant summary judgment in favor of the defendant-employer even when the plaintiff’s rationale seems reasonable.

## 2. Dismissal of Complaints if Plaintiff-Employees Do Not Strictly Adhere to Employer’s Reporting Procedure

Courts, particularly in the Fourth and Eleventh Circuits, have frequently found that plaintiffs’ delays in reporting were unreasonable as a matter of law because they did not follow the exact procedure specified in the defendant-employer’s anti-harassment policy.<sup>92</sup> The Eleventh Circuit

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Transp., 563 F.3d 1052, 1064 (10th Cir. 2009) (finding a two-and-a-half month delay to be unreasonable); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1307 (11th Cir. 2007) (holding a three-month delay unreasonable as a matter of law); *Walton v. Johnson & Johnson Serv., Inc.*, 347 F.3d 1272, 1293 (11th Cir. 2003) (finding a two-and-a-half month delay to be unreasonable); *Bennet v. K-Mart Corp.*, 10 F. App’x 520, 521-22 (9th Cir. 2001) (finding a four-month delay unreasonable as a matter of law); *Macias v. Sw. Cheese Co., LLC*, 181 F. Supp. 3d 883, 896 (D.N.M. 2016) (holding a five-month delay to be unreasonable).

<sup>89</sup> Marks, *supra* note 70, at 1429.

<sup>90</sup> 876 F. Supp. 2d 270, 284 (S.D.N.Y. 2012). The court noted that they were “unaware of any case holding a 5-month, or shorter, delay in taking advantage of a sexual harassment policy to preclude liability as a matter of law.” *Id.*; see also *United States v. Henry Cty.*, No. 09-4015, 2010 WL 3199687, at \*11 (C.D. Ill. Aug. 12, 2010) (declining to grant summary judgment though one employee waited six months after the first instance of harassment to report).

<sup>91</sup> See *supra* note 88.

<sup>92</sup> See, e.g., *Reese v. Meritor Auto., Inc.*, 5 F. App’x 239, 244-245 (4th Cir. 2001) (noting that “evidence that the plaintiff failed to utilize the company’s complaint procedure will normally suffice to satisfy [the company’s] burden under the second element of the defense”); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1301 (11th Cir. 2000) (noting the same); see also Kerri Lynn Stone, *Consenting Adults?: Why Women Who Submit to Supervisory Sexual Harassment Are Faring Better in Court than Those Who Say No . . . and Why They Shouldn’t*, 20 YALE J.L. & FEMINISM 25, 58 (2008) (explaining that “courts often adhere rigidly to the requirement that plaintiffs follow the exact course

has held that “once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances.”<sup>93</sup>

For example, in *Madray v. Publix Supermarkets*, although the plaintiff told multiple assistant managers and a manager of another department that her supervisor would inappropriately hug, touch, and kiss her, because the plaintiff did not complain to the store, district, or divisional manager per her employer’s anti-harassment policy, she was found to have acted unreasonably as a matter of law.<sup>94</sup> Similarly, in *Cooper v. CLP Corp.*, the Eleventh Circuit found that the plaintiff’s delay in reporting was unreasonable as a matter of law because although he reported his allegations of harassment to the defendant-employer’s district manager, the district manager “was not one of the company representatives to whom [the plaintiff] was supposed to report harassment under the policy” so this complaint was not sufficient.<sup>95</sup>

Finding that such plaintiffs, even those who informally complained, were unreasonable as a matter of law does not work to deter workplace harassment. In such cases, even if an employee felt comfortable reporting that harassment to someone in the company, courts have found this to be insufficient. When federal courts misconstrue the circumstances to grant summary judgment in favor of the defendant-employer, they prevent the actualization of the goal of encouraging employees to report.

### 3. Courts’ Unwillingness to Consider Plaintiffs’ Rationale for Waiting to Report Instances of Harassment

Even if a plaintiff has a justified reason for delaying to report, courts are quick to dismiss these rationales in considering the second element of the *Faragher-Ellerth* defense. Women may fear that they will be fired, demoted, treated adversely at work, or subjected to social ostracization because “no one will believe them, or . . . reporting will make the situation at work worse.”<sup>96</sup>

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of action prescribed by a defendant’s policy, even if a plaintiff acted in a manner that was reasonably calculated or likely to put the defendant on actual notice of harassment requiring correction”).

<sup>93</sup> *Madray*, 208 F.3d at 1300 (internal quotations omitted).

<sup>94</sup> *Id.* at 1293, 1300.

<sup>95</sup> 679 F. App’x 851, 855 (11th Cir. 2017).

<sup>96</sup> Anne Lawton, *Between Scylla and Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 618-19 (2007); Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 51 (2018); see also Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 1, 23 (2003) (“Sexual harassment victims have traditionally tended not to utilize internal complaint procedures or otherwise formally report problems of harassment.”).

Studies have found that “a common reaction by victims is to ignore the harassment or take ‘costly steps’ to avoid the harasser or the job” such that the “least frequent response is to report.”<sup>97</sup> Such fears are not unsubstantiated, as one study found that upwards of 75% of women who have reported instances of harassment in the workplace were retaliated against by their employer.<sup>98</sup>

However, federal courts have repeatedly held that “[a] generalized fear of retaliation does not excuse a failure to report sexual harassment.”<sup>99</sup> Courts have held that to substantiate her claims, the employee-plaintiff must provide specific, credible evidence that she will be retaliated against, and failure to do so will result in the employer-defendant satisfying the second element of the defense.<sup>100</sup> Despite this, even in instances in which an employee provided evidence to support her fear of retaliation, many courts have discredited that evidence and granted judgment for the employer as a matter of law.<sup>101</sup>

For example, in *Terry v. Laurel Oaks Behavioral Health Center*, the plaintiff alleged that her supervisor propositioned her to engage in sexual activity

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<sup>97</sup> Porter, *supra* note 96, at 51.

<sup>98</sup> Feldblum & Lipnic, *supra* note 7, at 16 (citing Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8(4) J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003)); *see also* Hebert, *supra* note 45, at 741 (“[S]tudies of women who have made complaints of sexual harassment demonstrate that such women have often faced retaliation, including ostracization by their coworkers, loss of opportunities for advancement, transfer to less desirable positions, and even loss of employment.”).

<sup>99</sup> *Dowdy v. North Carolina*, 23 F. App’x 121, 123 (4th Cir. 2001) (citing *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001)); *see also, e.g.*, *McKinney v. G4S Gov’t Sol., Inc.*, 711 F. App’x 130, 137 (4th Cir. 2017) (noting fear of retaliation does not relieve duty to report); *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 457 (6th Cir. 2008) (same); *Adams v. O’Reilly Auto., Inc.*, 538 F.3d 926, 932 (8th Cir. 2008) (same); *Howard v. City of Robertsdale*, 168 F. App’x 883, 888 (11th Cir. 2006) (same); *An v. Regents of Univ. of Cal.*, 94 F. App’x 667, 675 (10th Cir. 2004) (citing *Harrison v. Eddy Potash, Inc.*, 284 F.3d 1014, 1026 (10th Cir. 2001)) (same); *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 644 (7th Cir. 2000) (same).

<sup>100</sup> *See, e.g.*, *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003) (noting that “for policy reasons representing a compromise, more than ordinary fear or embarrassment is needed” to substantiate such a claim); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 295 (2d Cir. 1999) (noting that the plaintiff’s reasons for waiting to report instances of harassment “[were] not based on a credible fear that . . . she would suffer some adverse employment action as a result of filing a complaint”); *see also Thornton*, 530 F.3d at 457 (citing *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290-91 (11th Cir. 2003)) (noting that the plaintiff did not provide evidence that she was subject to a “credible threat of retaliation”); *Howard v. City of Robertsdale*, 168 F. App’x 883, 888 (11th Cir. 2006) (explaining that because the plaintiff only asserted a “generalized fear of retaliation, and the record offer[ed] no objective evidence to substantiate her fear,” the defendant-employer satisfied the second element of the defense). *But see Venuti*, *supra* note 25, at 554 (explaining that “[i]n situations where plaintiffs assert that a subjective fear prevented them from promptly reporting harassment, courts typically seek evidence of a credible threat”).

<sup>101</sup> *See Hebert*, *supra* note 45, at 725 (“Courts have generally rejected the contentions of employees that they justifiably delayed reporting sexual harassment because of their fears of retaliation. Even courts that have expressed a willingness to consider [it] . . . have insisted on objective evidence of the likelihood of retaliatory conduct.”).

several times, among other comments.<sup>102</sup> However, the court found that because the plaintiff waited six months to report the harassment after the first alleged incident, her delay in reporting was unreasonable as a matter of law, even though she explained that she delayed reporting out of fear of losing her job.<sup>103</sup> After reporting the harassment, the plaintiff was fired, as she predicted and feared, “when she refused to sign a counseling form based upon alleged misconduct arising from an [unrelated] incident”; this may have provided objective, circumstantial evidence that her fears were substantiated.<sup>104</sup>

The Second Circuit has even gone a step further by explicitly instituting a burden-shifting analysis, not promulgated by the Supreme Court, that further places the onus on the victim. The Second Circuit has held that “[o]nce an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures.”<sup>105</sup> In *Eichler v. American Intern Group, Inc.*, for example, the plaintiff alleged that her immediate supervisor, Vince Corteselli, frequently made sexist remarks to her,<sup>106</sup> and the court held that the employer still satisfied the second element of the defense.<sup>107</sup> The court reasoned that because the plaintiff waited approximately a year until she officially reported the harassment to human resources, she breached “her ‘obligation of reasonable care to avoid harm.’”<sup>108</sup>

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<sup>102</sup> 1 F. Supp. 3d 1250, 1258-59 (M.D. Ala. 2014). The plaintiff also alleged that her supervisor “wrapped his arm around her neck, while asking her why she would not come to his house” and that “he accused her of playing hard to get and told her that he was going to keep trying until she ‘gave in’ to him.” *Id.* The plaintiff’s supervisor also made many other inappropriate comments such as approaching her and “look[ing] at his genitals while remarking, ‘[y]ou see what you do to me?’” and sitting next to her during meetings and bumping his leg against the plaintiff’s despite her asking him to stop. *Id.* at 1259.

<sup>103</sup> *Id.* at 1275. The plaintiff argued that she delayed reporting instances of harassment because she believed that human resources fired employees without just reason. *Id.*

<sup>104</sup> *Id.* at 1262, 1275.

<sup>105</sup> *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001).

<sup>106</sup> No. 05-5167, 2007 WL 963279, at \*2 (S.D.N.Y. Mar. 30, 2007) (internal citations omitted). The plaintiff alleged that Corteselli made comments such as, “You have tits. Just cry,” “if he and [plaintiff] were in Iran, he ‘would be able to stone [her] to death because [she] was a woman,’” and “‘Why don’t you find a husband and go get married[?] Like, get out of here. Don’t be in the work force.’” *Id.* Additionally, he frequently told her that she was “stupid,” cursed at her, and told her that “[she] could make mistakes because she had breasts,” among other comments. *Id.* at \*4-5.

<sup>107</sup> *Id.* at \*12-13.

<sup>108</sup> *Id.* at \*11 (citing *Barua v. Credit-Lyonnais*, No. 97-7991, 1998 WL 915892, at \*4 (S.D.N.Y. Dec. 30, 1998)). The court also reasoned that although the plaintiff complained in writing to managers senior to Corteselli twice, the complaints did not refer to sexual harassment but only to disrespectful conduct. For example, the plaintiff reported that Corteselli “repeatedly shouted that [the plaintiff] should ‘shut the fuck up and get the fuck out of his office.’” *Id.* at \*10. The court dismissed these concerns by stating that this evidence “added nothing to Corteselli’s statement other

Furthermore, the court stated that because the plaintiff did not bring credible evidence that she feared retaliation, such as “evidence to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints,” the employer-defendant had met its burden of the defense.<sup>109</sup>

Courts have justified such reasoning by explaining that “advancing a speculative ‘fear of retaliation’ . . . would undermine the primary objective of Title VII and could result in more, not less, sexual harassment going undetected.”<sup>110</sup> But requiring substantive evidence to support a fear of retaliation actually has the opposite effect. It propagates the notion that women’s claims of harassment should not be believed, even when studies have affirmatively found that reporting claims of harassment has led employees to experience instances of retaliation, justifying their silence.<sup>111</sup> One study that analyzed responses of 1,167 participants regarding their experiences with reporting harassment found that, compared with those who did not report, “those who voiced against their wrongdoers either directly or indirectly (to colleagues) generally experienced more [social retaliation victimization]” such as harassment, name-calling, ostracism, and threats.<sup>112</sup> It is apparent that these fears are not merely speculative. Furthermore, rather than encouraging women to report, this approach may actually impede reporting, as victims may decide that reporting is not worthwhile because their claims of harassment will likely be dismissed. Thus, this is also representative of how the second element of the affirmative defense has been problematically applied.

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than an indication that he *really* wanted [the plaintiff] to be quiet and leave. It thus was merely an intensifier.” *Id.*

<sup>109</sup> *Id.* at \*12-13; *see also* Delgado v. City of Stamford, No. 11-01735, 2015 WL 6675534, at \*31 (D. Conn. Nov. 2, 2015) (finding that although the plaintiff showed evidence that “may give rise to a reasonable inference that Plaintiff feared that [the supervisor] would retaliate if she complained to his superiors” regarding one instance of alleged harassment, this did not “give rise to a reasonable inference that Plaintiff feared that [the supervisor] would retaliate if she complained about the alleged harassment that forms the basis of her hostile work environment claim”). *But see* Venuti, *supra* note 25, at 556 (citing *Leopold v. Baccart, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001)) (explaining that “[t]he Court of Appeals for the Second Circuit held that a credible fear may be established if the ‘employer has ignored or resisted similar complaints’”).

<sup>110</sup> *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001).

<sup>111</sup> *See* Bergman et al., *infra* note 119 and related discussion.

<sup>112</sup> Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 248, 259 (2003).

4. The Invalidation of Victims' Responses to Harassment Fails to Consider the Psychological Impact Harassment Can Have on Victims and Fails to Support the Goal of Deterring Harassment

Regardless, courts' decisions to find plaintiffs' delays in reporting are problematic as they fail to consider the psychological impact harassment can have on victims. Courts are quick to jump to the conclusion that the dread one may experience when reporting is insufficient to justify a failure to report harassment. In doing so, courts have explained that though matters related to harassment "are of a delicate nature . . . [,] this 'inevitable unpleasantness' cannot excuse an employee from taking advantage of [the] employer's complaint procedure."<sup>113</sup> Such reasoning fails to consider how this impact may discourage women from reporting.

In *Butler v. Maryland Aviation Administration*, the plaintiff alleged that she was harassed by both of her supervisors: one supervisor stood, unannounced, outside of her home "at odd hours of the day and night," and the other touched her genitals, called her sexual names, and described his sexual preferences to her in a graphic manner.<sup>114</sup> The court granted summary judgment for the defendant-employer, and found that the employer satisfied the second element of the defense because the plaintiff-employee endured harassment for over a year without reporting it.<sup>115</sup> The court explicitly noted that it could not consider the "unpleasantness" associated with reporting a claim of harassment, thus allowing the defendant-employer to escape liability despite the unacceptable conduct by the plaintiff's supervisors.<sup>116</sup> The courts have failed to give due consideration to the extent to which harassment can cause anxiety for victims, noting that "an employee's subjective fears of confrontation [and] unpleasantness . . . do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment."<sup>117</sup>

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<sup>113</sup> *Reese v. Meritor Auto., Inc.*, 5 F. App'x 239, 245 (4th Cir. 2001) (citing *Barret*, 240 F.3d at 268); *see also* *Johnson v. Holder*, No. 10-1222, 2013 WL 787667, at \*12 (D.S.C. Jan. 16, 2013) (noting the same); *Butler v. Maryland Aviation Admin.*, No. 11-2854, 2012 WL 3541985, at \*7 (D. Md. Aug. 14, 2012) (noting the same).

<sup>114</sup> *Butler*, 2012 WL 3541985, at \*1.

<sup>115</sup> *Id.* at \*7.

<sup>116</sup> *Id.*

<sup>117</sup> *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 457 (6th Cir. 2008) (quoting *Williams v. Mo. Dep't of Mental Health*, 407 F.3d 972, 977 (8th Cir. 2005)); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999). *See* *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) (explaining that "[w]hile such events might cause an employee stress, the unpleasantness cannot override the duty to report sexual harassment."); *see also* *Howard v. City of Robertsedale*, 168 F. App'x 883, 888 (11th Cir. 2006) (noting that fears of confrontation or unpleasantness do not alleviate a duty to report); *McInnis v. Fairfield Cmty., Inc.*, 458 F.3d 1129, 1141 (10th Cir. 2006) (noting the same); *Williams*, 407 F.3d at 977 (same); *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 644 (7th Cir. 2000) (same); *Carroll v. ATA Retail Serv., Inc.*, No. 14-00747, 2016 WL 8417377, at \*10 (N.D. Ga. Jan. 8, 2016) (same); *Moncel v. Sullivan's of Ind., Inc.*, No. 12-1720, 2014 WL 1905485, at \*6 (S.D. Ind. May

Relying on such reasoning is problematic as it discounts “the stark realities of being a harassment victim and feeling isolated, mistrusted, and fearful” as well as traumatized.<sup>118</sup> Studies have found that victims of harassment may suffer forms of psychological distress from reporting.<sup>119</sup> It is possible that these effects contribute to the underreporting of harassment claims. A study that analyzed the longitudinal effects of harassment on mental health found that “harassment is a stressor that has a positive and linear relationship with depressive affect” and that there is “evidence that harassment early in the career has long-term effects on depressive symptoms in adulthood.”<sup>120</sup> The study noted that the stress of harassment may lead to “feelings of anger, self-blame, and self-doubt” and “may diminish coping resources, such as self-esteem and mastery.”<sup>121</sup> Researchers have found that “harassment victims are likely to have similar psychological symptoms as those who experience traumatic events” and that victims of harassment have had other negative physical side effects such as sleep disturbances and gastrointestinal disorders.<sup>122</sup> The effects harassment can have on mental health may contribute to why seventy percent of victims of workplace harassment “never even talk[] with a supervisor, manager, or union representative about the harassing conduct” and are more likely to confide in a family member or friend.<sup>123</sup>

Further, courts’ disregard of the psychological toll harassment can take on victims and their reasons for hesitating to report is especially problematic because the Supreme Court has held that the defense is available when an employee has been constructively discharged. If a plaintiff alleges she was constructively discharged, the plaintiff “must show that the abusive working environment became so intolerable that her resignation qualified as a fitting

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13, 2014) (same); *Lee v. Norfolk S. Ry. Co.*, 912 F. Supp. 2d 375, 385 (W.D.N.C. 2012) (same); *Butler*, 2012 WL 3541985, at \*7 (same).

<sup>118</sup> Stone, *supra* note 92, at 50.

<sup>119</sup> Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230, 237 (2002); see also Linda L. Collinsworth, et al., *In Harm's Way: Factors Related to Psychological Distress Following Sexual Harassment*, 33 PSYCHOL. WOMEN Q. 475, 485 (2009) (explaining that “[s]ocial science research has repeatedly documented a connection between sexually harassing experiences and negative psychological outcomes”); Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC. & MENTAL HEALTH 89, 90 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029/> [https://perma.cc/4KAM-RGJ5] (explaining that psychologists have “theorize[d] that sexual harassment is a stressor that can lead to work withdrawal, career instability, job dissatisfaction, and poor mental and physical health”).

<sup>120</sup> Houle, *supra* note 119, at 101.

<sup>121</sup> *Id.* at 102.

<sup>122</sup> Darius K-S. Chan et al., *Examining the Job-Related, Psychological, and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review*, 32 PSYCHOL. WOMEN Q. 362, 363 (2008).

<sup>123</sup> Feldblum & Lipnic, *supra* note 7, at 23; see also *id.* (noting that “sexually coercive behavior was reported by only 30% of the women who experienced it.”).

response.”<sup>124</sup> In *Pennsylvania State Police v. Suders*, the Supreme Court held that constructive discharge alone is not a tangible employment action, and thus an employer-defendant can raise the defense not only when an employee leaves a place of employment on their own volition, but also in circumstances in which they feel that they are subject to a workplace so hostile, they have no choice but to resign.<sup>125</sup> Thus, an employee who experiences the traumatic effects of harassment may feel forced to leave, and the employer may still be able to escape liability by raising the affirmative defense.

For example, in *Wahlman v. DataSphere Technologies*, the plaintiffs alleged that their supervisors repeatedly sent them sexually explicit e-mails and messages, verbally abused them, and continually called them derogatory and sexist names.<sup>126</sup> After one supervisor was not disciplined for having a verbal outburst, he remarked that “he was ‘untouchable’ and that he could do whatever he wanted”; the harassment continued after the plaintiffs’ supervisor made these remarks.<sup>127</sup> The plaintiffs argued that they were constructively discharged because they felt compelled to resign due to the hostile work environment.<sup>128</sup> The court still granted the defendant-employer’s motion for summary judgment, holding that the defendant was entitled to the *Faragher-Ellerth* affirmative defense.<sup>129</sup> The court found that the second element was also satisfied because the employees never reported the harassment; however, the employment policy problematically required the plaintiffs to report the harassment to one of the supervisors engaging in the inappropriate conduct.<sup>130</sup> Thus, the court was unwilling to consider the plaintiffs’ rationale even in an instance where the plaintiffs felt forced out of their workplace by the harassment.

Further, in failing to consider the psychological impact harassment can have on victims, courts are failing to support the policy goals of Title VII.<sup>131</sup> As noted, in establishing the affirmative defense, the Court in *Faragher* and *Ellerth* sought to promote a policy that encouraged women to report

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<sup>124</sup> Pa. State Police v. Suders, 542 U.S. 129, 134 (2004).

<sup>125</sup> *Id.* at 152.

<sup>126</sup> No. 12-1997, 2014 WL 794269, at \*1-2 (W.D. Wash. Feb. 27, 2014).

<sup>127</sup> *Id.* at \*2.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at \*9.

<sup>130</sup> *Id.* The court found that the first element of the defense was satisfied because the defendant-employer had a harassment policy and had provided written and verbal warnings to one supervisor. *Id.*

<sup>131</sup> See Venuti, *supra* note 25, at 564 (“Courts granting summary judgment in favor of an employer without fully considering the context that may cause a reporting delay is contrary to the purpose of Title VII.”).

instances of harassment.<sup>132</sup> Federal courts have emphasized the importance of notice, explaining that “[t]he law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists.”<sup>133</sup> Through this, courts have placed an “obligation to use reasonable care to avoid harm” on the victim.<sup>134</sup>

Applying such reasoning blames a victim for failing to report and does not encourage employers to take a proactive view to deter harassment in the workplace. Though courts have argued that excusing a delay in reporting would be inconsistent with the goals of Title VII,<sup>135</sup> it fails to give credence to plaintiffs’ claims and does not serve to deter harm.

Overall, courts’ disregard of both plaintiffs’ reasons for delaying to report and the psychological impact of harassment highlights the problematic application of this defense.

### III. #METOO AND A RECOGNIZED NEED FOR CHANGES IN THE LAW RELATED TO WORKPLACE HARASSMENT

Considering the manner in which federal circuits apply both elements of the defense, it is evident that employee-victims face numerous obstacles in bringing their claims. In the immediate aftermath of *Ellerth* and *Faragher*, scholars opined on the effect these decisions would have on plaintiff-employee claims as it became apparent that “[t]he *Ellerth* defense is supposed to impose upon employers the burden of proof under a conjunctively framed two-pronged test, and both prongs of this test raise numerous, typically fact-sensitive questions about ‘reasonableness’ that one would think are generally

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<sup>132</sup> The Court in *Faragher* promoted the policy interests reflected in a 1990 EEOC statement that noted employers should implement policies “designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (internal quotations omitted).

<sup>133</sup> *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001); *see also* *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009) (applying this reasoning to justify the defendant-employer’s fulfillment of the second prong of the defense, even though she waited only two months to report instances of harassment); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (placing the burden on plaintiff-employees to provide justified reasons for failure to report harassment); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (noting that “the law of sexual harassment is not self-enforcing”); *Payne v. Great Plains Coca-Cola Bottling Co.*, 348 F. Supp. 3d 1194, 1202 (N.D. Okla. 2018) (“As the Tenth Circuit has explained, adequate notice of the sexually harassing conduct is a necessary precursor to trigger an employer’s duty to take corrective action.”).

<sup>134</sup> *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003).

<sup>135</sup> *See, e.g., Reese v. Meritor Auto., Inc.*, 5 F. App’x 239, 245 (4th Cir. 2001) (explaining that “the effects of excusing failures to report would be far reaching and inconsistent with Title VII’s goal of purging the workplace of sexual harassment”).

best suited for juries.”<sup>136</sup> In the current era, over twenty years after the Supreme Court upheld the *Faragher-Ellerth* affirmative defense, it is time to revisit its application. In the wake of #MeToo, courts should place a greater focus on the reasonableness of the plaintiff and provide more weight to the credibility of their claims. Overall, it is time to redefine what reasonableness means in the context of this affirmative defense.

#### A. *The Influence of the #MeToo Movement*

The #MeToo movement has shed greater light on the detrimental effects harassment can have on women. The movement has given “a microphone to victims willing to share their experiences of harassment. It showcased the lasting impact an act of [harassment]” can have.<sup>137</sup> In addition to bringing international attention to the issue, the movement has begun to influence the legal sphere as well.

Currently, many states are passing, or seeking to pass, legislation that affects non-disclosure and non-disparagement provisions.<sup>138</sup> For example, “a broad non-disparagement provision could restrict a party from making even truthful statements about the other if that would adversely affect the other’s reputation.”<sup>139</sup> Because many employers require new hires to sign agreements that include such provisions, some provisions may limit employees ability to speak out about allegations of workplace harassment.<sup>140</sup> However, several states have introduced and passed legislation making such agreements, particularly non-disclosure agreements, unenforceable if they limit an employee’s ability to disclose allegations of sexual harassment.<sup>141</sup> Several states have adopted legislation that seeks to ban non-disclosure agreements as related to sexual harassment and discrimination.<sup>142</sup> A bill was also introduced in Congress that would outlaw non-disclosure and non-

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<sup>136</sup> Marks, *supra* note 70, at 1437.

<sup>137</sup> See Elizabeth Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 242 (2018).

<sup>138</sup> Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, A. BAR ASS’N, [https://www.americanbar.org/groups/dispute\\_resolution/publications/dispute\\_resolution\\_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/](https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/) [https://perma.cc/RZ5D-3DSK].

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., *id.*

<sup>141</sup> *Id.*

<sup>142</sup> Anna North, *7 Positive Changes that Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019> [https://perma.cc/CXV9-L5QL] (“In September 2018, California banned the agreements in cases involving sexual assault, harassment, or sex discrimination. New York and New Jersey enacted similar laws.”).

disparagement agreements in employment contracts to ensure victims of workplace harassment are not silenced.<sup>143</sup>

Likewise, certain courts are beginning to recognize the admissibility of “me-too” evidence, which entails “other instances of discrimination or harassment against other employees by the alleged harasser or the same employer” that can be used “in an effort to show a pattern or practice of misconduct to prove or at least bolster discrimination or harassment claims.”<sup>144</sup> Although the question of the admissibility of this kind of evidence arose before the #MeToo movement, and the Supreme Court previously ruled “that such evidence is neither *per se* admissible nor *per se* inadmissible,”<sup>145</sup> in light of the movement several federal courts have allowed such probative evidence to support such hostile work environment claims.<sup>146</sup>

Additionally, attention has been brought to the “severe and pervasive” standard of hostile work environment claims. Federal courts have historically found that certain conduct may not be grave enough to meet the standard of severe or pervasive, even if an employee had been subject to frequent inappropriate conduct.<sup>147</sup> However, in the wake of #MeToo, many have criticized the stringent manner in which this element has been applied, and scholars have predicted that the movement may influence how judges approach the application of this element of such claims.<sup>148</sup> Significantly, in

<sup>143</sup> Lauren Holter, *What is the EMPOWER Act? This Workplace Harassment Bill Could Make NDAs a Thing of the Past*, BUSTLE (July 17, 2018), <https://www.bustle.com/p/what-is-the-empower-act-this-workplace-harassment-bill-could-make-ndas-a-thing-of-the-past-9792924> [<https://perma.cc/G5MC-GAG2>].

<sup>144</sup> Justin Hanassab & Kathryn T. McGuigan, “*Me-Too* Evidence in the Era of the #MeToo Movement”, 3 BENDER’S CAL. LAB. & EMP. BULL. 71, 71, 73 (2018), <https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2018/bendersca-metoo-evidence-march2018.ashx> [<https://perma.cc/R2R3-PX5C>].

<sup>145</sup> Sprint/United Mgmt. Co. v. Mendelsohn, 522 U.S. 379, 381 (2008).

<sup>146</sup> See Hanassab & McGuigan, *supra* note 144, at 73-74.

<sup>147</sup> See H.R. 2148, 116th Cong. § 204(a)(17) (2019) (explaining that “some lower court decisions further have interpreted the ‘severe or pervasive’ language in the Meritor decision so narrowly as to recognize only the most egregious conduct as unlawful, despite Congress’ intent that title VII of the Civil Rights Act of 1964 afford a broad scope of protection from discrimination”); see also Mitchell v. Pope, 189 F. App’x 911, 913-14 (11th Cir. 2006) (finding that instances of sexually derogatory remarks and offensive touching did not meet the severe or pervasive standard).

<sup>148</sup> See e.g., Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html> [<https://perma.cc/HUP6-GZPQ>] (“[A] supervisor raping an employee has consistently been viewed as ‘severe’ enough to meet the bar . . . . Other conduct, by contrast, is never going to meet the threshold—say, if a supervisor asks an employee out on a date once and does not treat her differently after she declines. In the middle, however, some judges see an area of uncertainty. And in such cases, courts often err on the side of dismissal.”); see also Rebecca White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1, 7 (2018), [https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2159&context=fac\\_artchop](https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2159&context=fac_artchop)

2019, the BE HEARD Act was introduced before Congress and seeks to redefine this standard.<sup>149</sup>

The emphasis this movement has brought to issues of harassment can aid in changing the way instances of workplace harassment are handled. However, the founder of the #MeToo movement, Tarana Burke, has expressed concern over the direction the movement has taken, noting that “[s]uddenly, a movement to centre survivors of sexual violence is being talked about as a vindictive plot against men.”<sup>150</sup> Thus, the focus should be centered on changing the law in order to best support survivors of harassment. Social movements can fade from the spotlight or be misconstrued to achieve political aim, but the law is what will enable change to endure.<sup>151</sup>

Based on the problematic nature in which the *Faragher-Ellerth* defense has been applied, federal courts should take an approach that emphasizes consideration of the reasonableness of the plaintiffs’ actions and their employers’ response. This framework should set a standard that aims to eradicate the incongruous applications of both the first and second element of the defense. With regard to the first element, rather than accepting that the implementation of an anti-harassment policy is satisfactory at face value, the approach should encourage consideration of whether the policy the employer put in place to prevent harassment had the means of being effective. Additionally, it should encourage consideration of whether the employer’s efforts to correct instances of harassment were reasonable in light of the circumstances. This framework should prevent courts from engaging in burden-shifting analyses or approaches that allow courts to circumvent any aspect of the defense. Similarly, it should deter courts from systematically finding that a delay in the employee’s reporting is unreasonable as a matter

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[<https://perma.cc/VX5T-P233>] (noting that “lower courts . . . have freedom to determine that conduct that may not have been regarded as sufficiently severe or pervasive even just a few years ago should now be recognized as actionable”); Tippet, *supra* note 137, at 242 (“Judges of all stripes may be influenced by MeToo in ways that alter their application of the legal rules.”).

<sup>149</sup> The Act’s name stands for “Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace.” Vania Leveille & Lenora M. Lapidus, *The BE HEARD Act Will Overhaul Workplace Harassment Laws*, ACLU (Apr. 10, 2019), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/be-heard-act-will-overhaul-workplace-harassment-laws> [<https://perma.cc/AM8M-VDT5>]. The bill addresses the issue of an inexact, severe, and pervasive standard and seeks to establish a uniform standard of liability to be applied in cases of workplace harassment. H.R. 2148, 116th Cong. § 204(a)(11)-(19), (b)(2) (2019).

<sup>150</sup> Tarana Burke, *MeToo Movement Not a War Against Men*, BBC (Feb. 21, 2020), <https://www.bbc.com/news/av/world-51574913/tarana-burke-metoo-movement-not-a-war-against-men> [<https://perma.cc/6AJM-L4X8>]; Jane Wakefield, *MeToo Founder Tarana Burke: Campaign Now ‘Unrecognizable’*, BBC (Nov. 28, 2018), <https://www.bbc.com/news/world-46393369> [<https://perma.cc/8TX3-BDG8>].

<sup>151</sup> Last year, scholar Elizabeth Tippet predicted that the #MeToo movement could influence court decisions, including those with respect to *Faragher-Ellerth*. See Tippet, *supra* note 137, at 243.

of law. As these cases typically involve fact-specific issues, courts should refrain from determining these issues as a matter of law. The goal of this approach would be to ameliorate the aforementioned issues with the *Faragher-Ellerth* defense, specifically to prevent inconsistent applications of the defense and to encourage courts to recognize the psychological impact harassment may have on women. Overall, it would seek to inhibit courts from granting summary judgment in instances where there is merit to the plaintiff's claim, and to seek to deter future instances of workplace harassment.

One such approach has been recognized by the Third Circuit in a case published in July of 2018. In *Minarsky v. Susquehanna County*,<sup>152</sup> the Third Circuit explicitly acknowledged the impact of the #MeToo movement and emphasized that a standard of reasonableness should govern the application of the *Faragher-Ellerth* defense.<sup>153</sup> The court recognized that it should not presume the defendant-employer followed best practices with respect to the first element of the defense, and the court acknowledged the impact harassment can have on the responses and reactions of victims.<sup>154</sup> The court found that such reasonableness is best left for the jury to decide.<sup>155</sup> As of now, no other jurisdiction outside of the Third Circuit has adopted this approach.<sup>156</sup> The adoption of this, or a similar approach, would result in a more uniform application of the defense and can help lead to more justified outcomes for victims.

#### B. *The Recognition of #MeToo in the Third Circuit's Interpretation of Faragher-Ellerth*

The Third Circuit's opinion in *Minarsky v. Susquehanna County* addressed the *Faragher-Ellerth* affirmative defense through a more appropriate lens in light of the #MeToo movement and increased attention to workplace harassment. In this case, the Third Circuit addressed head-on how the "appeal [came] to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims."<sup>157</sup> The plaintiff, Minarsky, worked as a part-time secretary for Yadlosky at the Susquehanna County Department of Veterans Affairs beginning in 2009.<sup>158</sup> Yadlosky was her direct supervisor.<sup>159</sup> Minarsky

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<sup>152</sup> 895 F.3d 303 (3d Cir. 2018).

<sup>153</sup> See *infra* Section III.B.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> A search on Westlaw's public court records reveals that the only district courts that have applied the reasoning in *Minarsky* specifically are courts within the Third Circuit.

<sup>157</sup> *Minarsky*, 895 F.3d at 313 n.12.

<sup>158</sup> *Id.* at 306.

<sup>159</sup> *Id.*

alleged that Yadlosky would try to “massage her shoulders or touch her face” each week and would try to kiss her each Friday before she left “pull[ing] [her] against him.”<sup>160</sup> Minarsky also alleged that Yadlosky would question her whereabouts if she left on a lunch break and would call her at home to ask personal questions.<sup>161</sup> Additionally, Yadlosky would send Minarsky sexually explicit messages from his work computer, to which Minarsky would never respond, among other inappropriate conduct.<sup>162</sup>

Susquehanna County had an anti-harassment policy that detailed that an employee could report any harassment committed by a supervisor to the Chief County Clerk or a County Commissioner.<sup>163</sup> Minarsky never filed a formal report of harassment because Minarsky witnessed the Chief County Clerk unsuccessfully reprimand Yadlosky for his inappropriate behavior towards other women on two occasions, and “there was no further action or follow-up, nor was any notation or report placed in Yadlosky’s personnel file.”<sup>164</sup> Furthermore, Minarsky claimed that Yadlosky warned her not to trust the County Commissioners or Chief County Clerk and that they would terminate her position if she did not “look busy.”<sup>165</sup> In 2013, after four years, Minarsky eventually confided in a co-worker about the harassment; the co-worker’s supervisor, overhearing the conversation, reported the harassment to the Chief County Clerk.<sup>166</sup> After an investigation, Yadlosky’s employment was eventually terminated.<sup>167</sup>

Minarsky brought a hostile work environment claim against Susquehanna County.<sup>168</sup> The district court granted summary judgment to the defendant-employer, holding that the county had satisfied both elements of the *Fargher-Ellerth* affirmative defense.<sup>169</sup> The district court, in accepting recommendations set by the magistrate judge for this case,<sup>170</sup> found that the county satisfied the first element because it had an anti-harassment policy, had reprimanded Yadlosky on two occasions in the past, and had terminated

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 307.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 308.

<sup>164</sup> *Id.* at 307.

<sup>165</sup> *Id.* at 308.

<sup>166</sup> *Id.* at 308-09.

<sup>167</sup> *Id.* at 309.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Per Federal Rule of Civil Procedure 72, a district judge may refer review of a dispositive motion to a magistrate judge; the district court may conduct a de novo review of the recommendation and accept, reject, or modify the magistrate judge’s recommendation de novo. FED. R. CIV. P. 72(b). Here, the district court adopted the findings of the Magistrate Judge in this case. *See Minarsky v. Susquehanna Cty.*, No. 14-2021, 2017 WL 44759781, at \*1 (M.D. Pa. May 22, 2017).

Yadlosky's employment in light of Minarsky's allegations.<sup>171</sup> The court held "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."<sup>172</sup> The lower court found that the second element of the offense was also met, adopting the Magistrate Judge's finding that Minarsky's failure to report the harassment was not reasonable: "Minarsky's alleged apprehension of the Chief Clerk and County Commissioners [were] unreasonable, because her mistrust of them came 'from the very employee Minarsky claims was harassing her,' and was not sufficient to excuse her failure to report."<sup>173</sup> The district court also adopted the finding that no reasonable jury could find that Minarsky acted reasonably in delaying to report.<sup>174</sup>

On appeal, the Third Circuit rejected this analysis and brought to light the problematic way in which the *Faragher-Ellerth* defense has been applied over the past two decades. Throughout its analysis, the Third Circuit emphasized that the jury was in the best position to determine the reasonableness of the situation, describing how "[t]he cornerstone of this analysis is reasonableness: the reasonableness of the employer's preventative and corrective measures, and the reasonableness of the employee's efforts (or lack thereof) to report misconduct and avoid further harm."<sup>175</sup>

With regard to the first element of the defense, the Third Circuit held that although the county had a policy in place, there were issues of material fact, and "[the court] cannot agree that the County's responses were so clearly sufficient as to warrant the District Court's conclusion as a matter of law."<sup>176</sup> The Third Circuit emphasized that the reasonableness of the employer's approach was best left to the jury to decide; although Yadlosky's employment was terminated, a jury could potentially find that the defendant-employer did not follow best practices considering that Yadlosky was previously reprimanded twice without further consequences.<sup>177</sup>

With regard to the second element of the defense, the Third Circuit declined to hold that Minarsky was unreasonable as a matter of law, even though Minarsky waited four years to report the allegations of harassment.<sup>178</sup> The Third Circuit emphasized how the circumstances of harassment can cause an employee to wait to report, explaining that:

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<sup>171</sup> *Minarsky*, 895 F.3d at 310-11.

<sup>172</sup> *Id.* at 313 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)).

<sup>173</sup> *Id.* at 311 (citing *Minarsky*, 2017 WL 44759781, at \*6).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 312.

<sup>177</sup> *Id.*

<sup>178</sup> The Third Circuit explained that Minarsky's fear of being fired, fear of Yadlosky's hostility, and belief that her efforts were futile were understandable "countervailing forces" that were additionally exacerbated by her "pressing financial situation" at the time. *Id.* at 314.

[W]e write to clarify that *a mere failure to report one's harassment is not per se unreasonable*. Moreover, the passage of time is just one factor in the analysis. Workplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the jury, in certain cases.<sup>179</sup>

The Court continued by explaining that:

If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial.<sup>180</sup>

The Third Circuit stressed that although federal courts have frequently found a plaintiff's hesitance or failure to report unreasonable, courts should consider how power dynamics between an employee and her supervisor can provide context to a plaintiff's fear of reporting; thus, courts should give greater credence to an employee's rationale for delaying or avoiding reporting.<sup>181</sup> The court explicitly referenced how, in many instances, a victim of harassment may "assert[] a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred" and although the policy of the affirmative defense "places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable."<sup>182</sup>

Although the Third Circuit recognized that they "are sensitive to the Supreme Court's emphasis that the second *Faragher-Ellerth* element is tied to the objective of Title VII, to avoid harm, rather than provide redress," the court explained that it is not correct to presume that reporting harassment will always end the conduct, and victims may have legitimate fear relating to reporting due to the circumstances.<sup>183</sup> This approach provides legitimacy to women's claims of harassment and fears that it may prevent one from speaking out.

This approach's conceptualization of reasonableness as the "cornerstone" of the offense, and emphasis that such fact-specific inquiries are best left to the jury, has redefined the application of this offense to provide an outcome more favorable to victims of workplace harassment. The definition of

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<sup>179</sup> *Id.* (emphasis added).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 313 n.12.

<sup>183</sup> *Id.* at 313 n.12, 315.

“reasonableness” as related to the defense has seemingly been misapplied, as federal courts have shoehorned the facts of many cases into the corners of the affirmative defense, despite the existence of evidence of which a reasonable jury could possibly find the defendant-employer liable. Here, the Third Circuit explicitly recognized that the law needs to give greater attention to this issue, referencing the #MeToo movement: “It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances.”<sup>184</sup> The court reaffirmed that the heart of the defense is reasonableness, highlighting the problematic and inconsistent application of the defense by federal courts and emphasizing how it is inappropriate for courts to hold, as a matter of law, that an employer’s decision to wait to report instances of harassment are unreasonable given the detrimental effects harassment can have on a victim.

### C. *Applying an Approach Centered Around Reasonableness to Supervisory Harassment Cases*

Federal courts nationwide should adopt an approach centered around reasonableness with respect to both prongs of the *Faragher-Ellerth* affirmative defense, like the approach articulated by the Third Circuit in *Minarsky*, and should encourage courts to refrain from deciding these issues as a matter of law. This will diminish the inconsistent applications of the defense and help recognize the justifiable reasons that women may wait to report instances of harassment. This will provide a greater means for deterring harassment and allow employees to survive summary judgment in appropriate instances.<sup>185</sup>

#### 1. Application to the First Element of the Affirmative Defense

Adoption of an approach centered on reasonableness would reduce federal courts’ inconsistent applications of the first element of the defense. As noted, federal courts have taken differing approaches when applying the prevention

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<sup>184</sup> *Id.* at 313 n.12; *see also*, Alejandra Arroyave Lopez, *Workplace Sexual Harassment Claim Revived Despite Delay in Reporting Misconduct*, LAPIN & LEICHTLING (July 17, 2018), <https://www.workplacesexualharassmentlaw.com/2018/07/workplace-sexual-harassment-claim-revived-despite-delay-reporting-misconduct/> [<https://perma.cc/A2F3-VK37>] (“Sheri Minarsky’s case is an example of how the law is being shaped by so many victims coming forward in the #metoo Movement, allowing victims more opportunities to seek redress for inexcusable conduct.”).

<sup>185</sup> *See e.g.*, Paul Mollica, *Minarsky v. Susquehanna Cty.*, No. 17-2646 (3d Cir. July 3, 2018), OUTTEN & GOLDEN LLP (July 3, 2018), <https://www.employmentlawblog.info/2018/07/minarsky-v-susquehanna-cty-no-17-2646-3d-cir-july-3-2018.shtml> [<https://perma.cc/4KVK-Y9E5>] (urging “[e]mployee advocates in this area . . . to rally behind this language, which portends a change in the way that harassment cases should be adjudicated”).

and correction sub-prongs of the first element.<sup>186</sup> Applying the Third Circuit's standard of reasonableness would prevent courts from finding that mere distribution of an anti-harassment policy is adequate to satisfy the prevention prong of the first element of the defense and encourage consideration of whether the policy itself is sufficient in preventing workplace harassment.<sup>187</sup> This issue is best left for the jury to decide, rather than allowing the court to determine that the employer's anti-harassment policy is facially valid.

Similarly, this approach would eliminate the unsubstantiated, rebuttable presumptions that plaintiff-employees are forced to overcome in several jurisdictions.<sup>188</sup> As noted, the Fourth Circuit has applied an approach that requires a plaintiff to provide evidence that her employer adopted an anti-harassment policy in bad faith or "was otherwise defective or dysfunctional" in order to show that the prevention prong has not been satisfied.<sup>189</sup> If the aforementioned approach to reasonableness had been applied in *McKinney v. G4S Government Solutions*,<sup>190</sup> the court would likely not have granted summary judgment against the plaintiff. In that case, the plaintiff's supervisor allegedly threatened employees to not utilize the policy or make complaints, but the court still held the defendant-employer satisfied the prevention prong.<sup>191</sup> A court in this instance should question the reasonableness of the employers' actions and should not find that the defendant-employer's prevention methods were satisfactory as a matter of law; instead, this should be left for the jury to decide.

As noted, some federal courts have seemingly circumvented applying the second prong of this element, the correction prong; the Eleventh Circuit and the district courts within its jurisdiction have done so,<sup>192</sup> while other federal

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<sup>186</sup> See *supra* Section II.A. Scholars have previously proposed implementing a standard such as the "reasonable woman" standard, considering that women respond and react differently to such harassment than men. See Hebert, *supra* note 45, at 732-42. I would argue that this approach propagates a gender divide, and that a standard "reasonableness" approach is more appropriate.

<sup>187</sup> See *supra* note 56 and related discussion. Though having juries resolve such claims could result in inconsistent outcomes, adopting an approach like the Third Circuit's would better resolve the problem of inconsistent application of the defense among federal courts that leads to unreasonable grants of summary judgment in favor of defendant-employers.

<sup>188</sup> See *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001) (noting that the Fourth Circuit applies the presumption that distribution of a harassment policy provides a rebuttable presumption that the employer exercised reasonable care with respect to the first prong that the employee can only overcome with evidence that the policy was made in bad faith or was otherwise defective); see also *supra* note 55 and related discussion.

<sup>189</sup> *Walton v. N.C. Dep't of Agric. & Consumer Servs.*, 494 F. App'x 300, 302 (4th Cir. 2012) (citing *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001)).

<sup>190</sup> 179 F. Supp. 3d 609, 623 (W.D. Va. 2016).

<sup>191</sup> *Id.*

<sup>192</sup> See *supra* note 64 and related discussion.

courts have required evidence that the employer's correction methods "must [have been] calculated to prevent further harassment."<sup>193</sup> Here, the reasonableness of the employers should not be determined as a matter of law. In the aforementioned case of *Scott v. Publix*, the Southern District of Florida found it was not necessary to apply the correction prong because the plaintiff did not provide notice to her employer of the alleged harassment.<sup>194</sup> This is an instance where the court should not have determined that the defendant-employer satisfied this sub-prong; it would be best left for the jury to examine the defendant-employer's reasonableness and decide whether the approach the employer took was sufficient, or if the employer should have taken more action.<sup>195</sup>

Overall, greater consideration should be taken in determining whether the defendant-employer has succeeded in both preventing and correcting instances of harassment. Courts should recognize that determining the appropriate level of reasonableness should not be decided as a matter of law; this will aid to prevent the application of inconsistent standards courts currently apply to the defense.

## 2. Application to the Second Element of the Affirmative Defense

Applying this standard of reasonableness to the second element of the affirmative defense would also aid in resolving the inconsistent applications of the defense. Specifically, this would erode the circuit split related to single-onset cases. As noted, the Fifth and Eighth Circuits provide that if an employee experiences a single, severe case of harassment, her claim will be dismissed if the defendant-employer meets only the first element of the affirmative defense.<sup>196</sup> If an approach like the Third Circuit's is applied, it would help to resolve this circuit split, and employees would not be at risk of having their claim of a severe instance of harassment fail at summary judgment in those jurisdictions. For example, if the reasonableness approach had been adopted in the aforementioned case of *Indest v. Freeman Decorating, Inc.*,<sup>197</sup> the plaintiff would not have been barred from having her claim heard on the merits simply because she was the victim of one, serious incident of harassment. Adopting this approach would allow plaintiffs across

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<sup>193</sup> *Cerros v. Steel Tech., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (citing *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996)); see *supra* note 69 and related discussion.

<sup>194</sup> No. 07-60624, 2008 WL 2940672, at \*7 (S.D. Fla. July 28, 2008); see *supra* note 66 and related discussion.

<sup>195</sup> *But see supra* note 69 and related discussion; *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001) (noting that it is not necessary to consider whether the employer's prevention and correction methods were successful).

<sup>196</sup> See *supra* Section II.B.

<sup>197</sup> 164 F.3d 258, 260 (5th Cir. 1999).

jurisdictions to have more consistent expectations of their claims at the pleadings stage, so that one plaintiff would not be more likely than another to win at the summary judgment stage depending on which jurisdiction the claim is brought in. It would also afford plaintiffs the opportunity for a more just outcome, rather than allowing courts to inequitably dispose of such claims through summary judgment.

Further, federal courts have frequently held that an employee's decision to delay reporting for a few weeks or months is unreasonable as a matter of law, enabling the defendant-employer to succeed at summary judgment.<sup>198</sup> The Supreme Court has never provided for a bright-line rule that indicates how long an employee is permitted to wait before reporting, resulting in uncertainty as to how this element should be evaluated. Courts should recognize that "a mere failure to report one's harassment is not *per se* unreasonable" and that "[w]orkplace sexual harassment is highly circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the jury" would limit the inclination of courts to hold that a victim of harassment was unreasonable for waiting a few months to report.<sup>199</sup> In contrast with *Hunt v. Wal-Mart Stores*, in which the court held the plaintiff was unreasonable for waiting four months to report the incidents of harassment,<sup>200</sup> Minarsky waited *four years* to report, and the Third Circuit still held that Minarsky's reasonableness was for the jury to decide.

This approach aptly recognizes that harassment can cause trauma, and that victims may feel uncomfortable expressing their concerns and experiences with their employers. Though in *Minarsky* the Third Circuit acknowledged that the underlying policy expressed in *Faragher* and *Ellerth* was "to avoid harm, rather than provide redress," the court emphasized how the plaintiff's reasons for failing to report should not be dismissed.<sup>201</sup> The emphasis on reasonableness recognizes that the judicial system should not fault a victim for waiting to report or discount "an employee's subjective fears of confrontation" or "unpleasantness" that they may experience when coping with the situation.<sup>202</sup> The Third Circuit understood the "physical and emotional toll" that harassment can have on a victim and did not disregard the implications such conduct can have on one's psyche.<sup>203</sup>

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<sup>198</sup> See *supra* Section II.C.

<sup>199</sup> *Minarsky v. Susquehanna County*, 895 F.3d 303, 314 (3d Cir. 2018).

<sup>200</sup> 931 F.3d 624, 631 (7th Cir. 2019); see *supra* notes 83–87 and related discussion.

<sup>201</sup> *Minarsky*, 895 F.3d at 313.

<sup>202</sup> *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 457 (6th Cir. 2008) (citing *Williams v. Missouri Dep't of Mental Health*, 407 F.3d 972, 977 (8th Cir. 2005)); see *supra* note 117 and related discussion.

<sup>203</sup> *Minarsky*, 895 F.3d at 316; see *supra* notes 101–117 and related discussion.

Additionally, under this approach, the factfinders can be forgiving to plaintiffs who may not follow their employer's policy exactly. As noted, courts have held that if a plaintiff reported an allegation of harassment to their employer but diverged from the procedure outlined in the employer's anti-harassment policy, her conduct can be held unreasonable as a matter of law.<sup>204</sup> However, a plaintiff may not feel comfortable reporting an instance of harassment to the party designated by her employer's anti-harassment policy. Thus, the court should not decide that it was unreasonable as a matter of law for the plaintiff to report an incident of harassment to a party other than the party designated in the employment policy, as this should be a consideration for the jury.

Further, victims of harassment may have legitimate fears and reasons for delaying their decisions to report, or for failing to report entirely. As noted, in many instances federal courts have held that a plaintiff was unreasonable for failing to report even though she feared that she would be retaliated against; courts have required plaintiffs to provide credible evidence to substantiate their claims and even shifted the burden on plaintiffs to report.<sup>205</sup> In contrast, an approach that emphasizes reasonableness supports giving weight to the fears and claims of plaintiffs. The Third Circuit's standard, as an exemplar, encompasses both subjective and objective components, as the plaintiff must hold a subjective fear of retaliation, and the jury must find this claim to be objectively reasonable.<sup>206</sup> This approach recognizes that plaintiffs' subjective fears should be given weight as credible evidence. This approach would allow plaintiffs' claims to survive summary judgment, rather than finding plaintiffs' response to be unreasonable as a matter of law.

Overall, application of the Third Circuit's framework provides great consideration to the plaintiffs' reasoning in deciding whether to report incidents of harassments. It recognizes the psychological impact harassment can have on victims, which federal courts tend to ignore. Other jurisdictions should adopt an approach that emphasizes reasonableness as it will allow plaintiffs to justly survive summary judgment, rather than prematurely dismissing their claims.<sup>207</sup>

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<sup>204</sup> See *supra* subsection II.C.2.

<sup>205</sup> See *supra* subsection II.C.3.

<sup>206</sup> *Minarsky*, 895 F.3d at 314. In *Minarsky*, the court explained that if "[p]resented with these facts, a reasonable jury could find that Minarsky's fears of aggravating her work environment was sufficiently specific, rather than simply a generalized, unsubstantiated fear." *Id.* at 315.

<sup>207</sup> Under this approach, the case can proceed to the jury, or may be settled, which can help these claims have a more just result. See Marks, *supra* note 70, at 1452 ("The confounding challenge of deciding these matters on summary judgment highlights the especially appropriate role of the jury in deciding the impact of the Ellerth defense . . .").

### 3. Additional Implications of Applying a Framework Focused on Reasonableness

If defendant-employers are granted summary judgment on fewer hostile work environment claims, this may encourage employers to strengthen and promote their anti-harassment policies and provide thorough anti-harassment training. Applying an approach like the Third Circuit's may encourage employers to provide extensive corrective measures if inappropriate conduct is reported. These changes would promote workplace measures that deter harassment, creating safer workplace environments.

Employers may fear that under this framework they would never be able to succeed on summary judgment, and that this approach would turn the defense into a form of strict liability. However, the approach would not prohibit a court from granting summary judgment for the defendant-employer, and the defendant-employer would still have the ability to raise a strong defense at the trial stage, if the defense does not otherwise settle the claim.

This approach would not be inconsistent with the manner in which other employment discrimination claims are treated. In the context of age discrimination claims, the Supreme Court has previously held that when a plaintiff brings forth credible evidence to establish his or her claim, liability should not be decided as a matter of law. In *Reeves v. Sanderson Plumbing Products*, the Supreme Court held that in an instance where a plaintiff establishes a prima facie case of discrimination in an age discrimination claim under the Age Discrimination of Employment Act and produces evidence for the jury to reject the defendants' nondiscriminatory explanations, the case should not be decided as a matter of law, and should go to the jury.<sup>208</sup> In concurrence, Justice Ginsburg noted that "the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence" relevant to the claim.<sup>209</sup> Thus, it would not be incongruous if the jury frequently considered the application of the *Faragher-Elleerth* defense in the context of hostile work environment cases.

It could be argued that promoting sending such cases to the jury will result in inconsistent outcomes, often unfavorable for plaintiffs. A study conducted in 2003 that analyzed every wrongful discharge and employment discrimination case reported in California in 1998 and 1999 found that there were "low success rates of women and minorities in employment discrimination cases," which may be explained by judicial bias.<sup>210</sup> However, it

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<sup>208</sup> 530 U.S. 133, 149-52 (2000).

<sup>209</sup> *Id.* at 155 (Ginsburg, J., concurring).

<sup>210</sup> David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 560 (2003).

is possible that in the current era juries are more understanding towards women's hostile work environment claims. Further, the law in itself should not unjustly bar plaintiffs' ability to succeed on these claims.

In this era of #MeToo, the benefits of adopting an approach that centers around reasonableness outweighs the potential negatives. Adopting an approach like the Third Circuit's can be the change the law needs to provide justified support for victims of workplace harassment.

#### CONCLUSION

Overall, federal courts' interpretations and applications of the *Faragher-Ellerth* defense to cases of workplace harassment committed by an employee's supervisor have been inconsistent across jurisdictions and have created unnecessary impediments to plaintiffs' claims. Though the Supreme Court in deciding *Faragher* and *Ellerth* sought to encourage women to report their harassment and deter harm, the application of the affirmative defense has been construed to frequently impede plaintiffs' claims. Both elements of the defense have been applied in inconsistent manners that do not achieve the Supreme Court's goals of deterring harm. Rather, the defense has been applied in a way that seems to justify defendant-employers providing limited measures to prevent harassment, while also failing to acknowledge that a plaintiff-employee may have legitimate reasons for failing to report instances of harassment to their employer.

Applying a framework that centers on reasonableness, like the Third Circuit's framework outlined in *Minarsky v. Susquehanna County*, would resolve many of these issues. If other federal circuit courts adopted this standard of reasonableness, it would reduce the inconsistent application of both elements of the defense and would provide greater recognition to the legitimacy of plaintiffs' reasons for failing to report harassment. Adopting this approach would aim to deter harm as the Supreme Court intended.

In the future, it would be beneficial for the Supreme Court to reevaluate the viability of the *Faragher-Ellerth* defense to align with the traditional policy goals of vicarious liability. Though the Court in *Faragher* and *Ellerth* declined to apply vicarious liability to the affirmative defense, treating claims of hostile work environment in the same manner in which intentional torts are treated may further the policy of deterring harm, something to be explored in a future work.